SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

Nos. 1199 and 1200

HEILIG BROTHERS CO.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD.

ON PETITION OF HEILIG BROTHERS CO. FOR WRITS OF CERTIORARI, DIRECTED TO THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA AND TO THE UNITED STATES CIRCUIT COURT FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONER.

Jurisdiction.

This case comes before the Court upon petition by Heilig Brothers Co. for writs of certiorari directed to the United States District Court for the Middle District of Pennsylvania and for the Circuit Court of Appeals for the Third Circuit, under Section 240 of the Judicial Code. (March 3, 1891, c. 517, Sec. 6, 26 Stat. 828; March 3, 1911, c. 231, Sec. 240, 36

Stat. 1157; February 13, 1925, c. 229, Sec. 1, 43 Stat. 938; 28 U. S. C. A., Sec. 347.)

Subsection (a) reads as follows:

> "In any case, civil or criminal, in a circuit court of appeals, or in the Court of Appeals of the District of Columbia, it shall be competent for the Supreme Court of the United States, upon the petition of any party thereto, whether Government or other litigant, to require by certiorari, either before or after a judgment or decree by such lower court, that the cause be certified to the Supreme Court for determination by it with the same power and authority, and with like effect, as if the cause had been brought there by unrestricted writ of error or appeal."

Statement of the Case.

On June 10, 1941 the National Labor Relations Board filed an order adjudging that the petitioner, Heilig Brothers Co., engaged in the manufacture and sale of screen cloth in York, Pennsylvania, had violated Sec. 8 (1) of the National Labor Relations Act relating to interference with the right of employees to join a union, and Sec. 8 (5) relating to refusal to bargain collectively with representatives of employees, and dismissing charges previously made under Sec. 8 (3), of discrimination in regard to hire by reason of union membership.

Petitioner, desiring a stay of the order of the Board pending a review by the Court, applied to the United States District Court for the Middle District of Pennsylvania by petition on August 9, 1941, all Circuit Courts of Appeal and the Court of Appeals for the District of Columbia being then on vacation. Sec. 10, subsections (e), (f) and (g) of the National Labor Relations Act, under which petitioner filed his petition for review with the United States District Court, are shown in the appendix at page 48 of this brief.

On September 6, 1941 the Board filed a motion to dismiss the petition for review before the District Court for lack of jurisdiction.

On September 11, 1941 petitioner filed an answer to the Board's motion to dismiss.

On October 7, 1941 the Board filed a petition for enforcement with the Circuit Court of Appeals for the Third Circuit. Argument on the application for enforcement was had before the Circuit Court of Appeals on October 20, 1941, at which time petitioner asked for a stay of enforcement of the order of the Board on the ground that there was a motion pending before the District Court for the review of the order, the petition for review in connection with this motion having been filed on August 9, 1941. The Circuit Court of Appeals was informed that the hearing before the District Court was to be heard two days later, on October 22, 1941, but on October 21, 1941 the Circuit Court of Appeals denied a stay.

On October 25, 1941 petitioner filed an answer to the Board's petition for enforcement in the Circuit Court of Appeals.

On December 10, 1941 the District Court dismissed the petition for review of the order of the Board on the ground of lack of jurisdiction, but notice of the decree of the District Court was not given to the attorney for the petitioner until shortly after December 17, 1941, on which date oral argument was had before the Circuit Court of Appeals on the petition for enforcement.

On January 2, 1942, the opinion of the Circuit Court of Appeals was filed granting the order for enforcement. Shortly thereafter application for rehearing before the Circuit Court of Appeals was made on the basis of the decision of this Court in *National Labor Relations Board* v. *Virginia Electric and Power Company*, 86 L. Ed., Adv.

p. 306, which decision was handed down subsequent to the oral argument before the Circuit Court of Appeals.

On January 31, 1942 the Circuit Court of Appeals denied the application for a rehearing.

Assignment of Errors.

(1) The District Court erred in dismissing the petition for review filed by petitioner on August 9, 1941 for lack of jurisdiction.

(2) The Circuit Court of Appeals erred in affirming the order of the Board insofar as it ordered re-instatement of named individuals without a finding of fact by the Board, supported by substantial evidence, that the persons ordered to be reinstated have not, prior to the date of the order, obtained other "regular and substantially equivalent employment", and without a provision in the order of the Board that the persons so named secure or attempt to secure such other equivalent employment prior to an offer of reinstatement.

ARGUMENT.

Point I.

On the equitable principle of mutuality of remedy, the District Court wrongfully refused to take jurisdiction of petitioner's application to review an administrative order which, during the vacation period of the Circuit Court of Appeals, it would, on application of the Board, have been bound to enforce.

A. *Equitable Nature of Proceeding before the Board and of Proceedings to Review or Enforce its Order.*

A proceeding before the National Labor Relations Board is equivalent to a suit in equity. *National Labor Relations Board* v. *Jones & Laughlin Steel Corp.*, 301 U. S.

1, 81 L. Ed. 893. In this case, upholding the constitutionality of the National Labor Relations Act, Mr. Chief Justice Hughes, rendering the opinion of the Court on writ of certiorari previously granted by the Court, mentioned the equitable nature of the proceeding, stating (at page 48 of 301 U. S. and page 918 of 81 L. Ed.) that it (the right of jury trial) "has no application where recovery of money damages is an incident to equitable relief even though damages might have been recovered in an action at law", citing *Clark* v. *Wooster,* 119 U. S. 322, 325, 30 L. Ed. 392, 393, and other cases.

To the same effect is the decision of this Court in the case of *Rochester Telephone Corporation* v. *United States,* 307 U. S. 125, 83 L. Ed. 1147, involving the dismissal of a bill in the District Court to review an order of the Federal Communications Commission directing the Rochester Telephone Corporation to give certain information relative to whether it was under the control of the New York Telephone Company. On direct appeal to this Court, the Court affirmed the action of the District Court after examining the question of the jurisdiction of the District Court to make the order. Delivering the opinion of the Court, Mr. Justice Frankfurter said (at p. 142 of 307 U. S., p. 1159 of 83 L. Ed.):

> "An action before the Interstate Commerce Commission is akin to an inclusive equity suit in which all relevant claims are adjusted, citing *Inland Steel Co.* v. *U. S.,* 306 U. S. 153, 83 L. Ed. 557, 59 S. Ct. 415."

The equitable nature of the proceeding is shown by the fact that disobedience of a court decree enforcing the order of the Board is punishable by contempt proceedings. *National Labor Relations Board* v. *Hopwood Retinning Co.,* (C. C. A. 2nd) 104 Fed. (2d) 302. In this case the Court stated that as a proceeding for contempt,

it is a continuance of the earlier suit in the same court, (viz., in equity), and a step in the enforcement of the decree therein.

The fact that laches bars a recovery for contempt for disobedience of a court decree enforcing a Board order, emphasizes the equitable nature of the proceeding. *National Labor Relations Board* v. *American Potash and Chemical Corp.*, (C. C. A. 9th) 113 Fed. (2d) 232.

In *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 80 L. Ed. 1015, Mr. Justice Sutherland, delivering the opinion of this Court on writ of certiorari to review the decree of the Circuit Court of Appeals, dismissing, for lack of jurisdiction, petitioner's application to withdraw his request for registration with the Securities and Exchange Commission of a proposed issue of securities, said (p. 15 of 298 U. S., p. 1021 of 80 L. Ed.):

> "Such a proceeding (the stop order proceeding by the Commission) is analogous to a suit in equity to obtain an injunction, and should be governed by like considerations."

B. *Mutuality of Remedy as Applied to this Proceeding.*

It is a general principle of equity to grant a decree of specific performance only in cases where there is a mutuality of obligation, and when the remedy is mutual. *Dorsey* v. *Packwood*, 12 How. 126, 13 L. Ed. 921; *United States* v. *Noe*, 23 How. 312, 16 L. Ed. 462.

When a contract is incapable of being enforced against one party, that party is equally incapable of enforcing it specifically against the other. *Rutland Marble Co.* v. *Ripley*, 10 Wall. 339, 19 L. Ed. 955.

C. *Section 10 (e), (f) and (g) Construed under the Principle of Mutuality of Remedy.*

In the present case, under Sec. 10 (e) of the National Labor Relations Act (page 48 of this brief), the Board

may apply for an order of enforcement to the Circuit Court of Appeals, or if the Circuit Court of Appeals is in vacation, then to the District Court. Under subsection (f) the right of review of an order of the Board appears to lie only to the Circuit Court of Appeals. However, such a reading of Sec. 10 (e) and (f), would deprive the employer of an opportunity, during the vacation of the Circuit Court of Appeals, to apply to the District Court for a review of the Board's order and thereby to lay the basis for an application for a stay of the Board's order pending court review.

In the present case, the order of the Board was filed on June 10, 1941. Shortly thereafter the Circuit Courts of Appeal closed for the summer. In order to obtain a stay of the Board's order pending court review, it was necessary for the petitioner to take an appeal to a court sitting during the summer, namely, the District Court, which he did on August 9, 1941. The necessity for such a step is indicated by subsection (g) of Sec. 10, which provides that:

> "the commencement of proceedings under subsection (e) or (f) of this section shall not, unless specifically ordered by the court, operate as a stay of the Board's order."

It has been held that the provisions of a statute regarding its enforcement and review must be read together. *Crancer* v. *U. S.*, 23 F. Supp. 690 (D. C., E. D. Missouri), affirmed per curiam 305 U. S. 567, 83 L. Ed. 357. This was a suit to enjoin the enforcement of an order of the Interstate Commerce Commission refusing the application of the petitioner to have certain rates, less than those charged by the carrier to him, applied by the Commission to certain commodities. Denying the petitioner relief, the District Court said on page 691:

> "This court is not vested with authority to review generally orders of the Commission. The jurisdiction of

the Court in such matters is granted by the statute, 28 U. S. C. A. Sec. 41 (27), (28), in the following instances.

(1) Of all cases for the enforcement of any order of the I. C. C.

(2) Of all cases to set aside, annul, or suspend, in whole or in part, any order of the I. C. C.

"The Supreme Court has consistently ruled that these two paragraphs are to be read together."

The refusal of the District Court to enjoin the enforcement of the order of the I. C. C. was affirmed by this Court. While the ground on which the District Court went, viz., the distinction between a so-called "affirmative" and a so-called "negative" order has been repudiated by this Court in *Rochester Telephone Corporation* v. *U. S.*, 307 U. S. 125, 83 L. Ed. 1147, nevertheless the case may be supported on the principle of administrative finality, laid down in the *Rochester* case, the question of what rate to apply under the circumstances of the *Crancer* case being essentially one for the judgment of the Interstate Commerce Commission, supported as it was by substantial evidence.

There is no doubt that the enforcement and reviewing provisions with respect to an order of the Interstate Commerce Commission apply equally to the enforcement and reviewing provisions of an order of the National Labor Relations Board. To grant to the Board the right to enforce, while denying to the petitioner the right to review, in the District Court, an order of the Board during the vacation of the Circuit Court of Appeals is a denial of mutuality of remedy accorded in courts of equity.

Subsection (f) of Sec. 10 provides in its last sentence that upon such filing (of a transcript of the entire record

by the aggrieved party) the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

A reading together of subsections (e) and (f) lays a basis for petitioner's contention that if the court shall proceed in the same manner under subsection (f) for review, as in the case of an application by the Board under subsection (e) for enforcement, then if the Circuit Court of Appeals is in vacation, the application may be made to the District Court.

Subsection (e), first sentence, provides that the Board shall have power, in connection with an application to the Court for enforcement, to apply for appropriate temporary relief or restraining order. It is to this provision that the last sentence of subsection (f) applies, that the court shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

Enforcement and review are merely different aspects of the same process, namely, the determination of the validity of an order of the Board. Access to the District Court during the vacation period and power to apply to the court for temporary relief belong equally to the petitioner and to the Board. A reading of subsection (e) and (f) which gives such right to the Board and denies it to the petitioner is as much subject to question as the attempt to procure from this Court in *Jones* v. *Securities and Exchange Commission*, 298 U. S. 1, 80 L. Ed. 1015, a decision that the Commission had the right to question the applicant after he had voluntarily withdrawn his application for registration. The language of Mr. Justice Sutherland,

speaking for the Court, is equally applicable to both situations (p. 23 of 298 U. S., p. 1025 of 80 L. Ed.):

> "The action of the commission finds no support in right principle or in law. It is wholly unreasonable and arbitrary. It violates the cardinal precept upon which the constitutional safeguards of personal liberty ultimately rest—that this shall be a government of laws—because to the precise extent that the mere will of an official or an official body is permitted to take the place of allowable official discretion or to supplant the standing law as a rule of human conduct, the government ceases to be one of laws and becomes an autocracy. Against the threat of such a contingency the courts have always been vigilant, and, if they are to perform their constitutional duties in the future, must never cease to be vigilant, to detect and turn aside the danger at its beginning. The admonition of Mr. Justice Bradley in *Boyd* v. *United States*, 116 U. S. 616, 635, 29 L. Ed. 746, 752, 6 S. Ct. 520, should never be forgotten: 'It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure * * * It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachment thereon. Their motto should be obsta principiis.'
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> "Arbitrary power and the rule of the Constitution cannot both exist. They are antagonistic and incompatible forces, and one or the other must of necessity perish whenever they are brought into conflict. To borrow the words of Mr. Justice Day—'there is no place in our constitutional system for the exercise of arbitrary power.' *Garfield* v. *United States*, 211 U. S. 249, 262, 53 L. Ed. 168, 174, 29 S. Ct. 62. To escape assumptions of such power on the part of the three primary departments of the government, is not enough. Our institutions must be kept free from the appropriation of unauthorized power of lesser agencies as well. And if the various administrative bureaus and commis-

> sions, necessarily called and being called into existence by the increasing complexities of our modern business and political affairs, are permitted gradually to extend their powers by encroachments—even petty encroachments—upon the fundamental rights, privileges and immunities of the people, we shall in the end, while avoiding the fatal consequences of a supreme autocracy, become submerged by a multitude of minor invasions of personal rights, less destructive but no less violative of constitutional guaranties * * *."

While it may be urged on behalf of the Board that a reading of subsections (e) and (f) giving it the right to apply for an order of enforcement during vacation period, while denying the right to seek a review from the District Court on the part of the petitioner, so that he might apply for a stay, is only a "slight deviation from legal modes of procedure", it is as much a denial to him of the equal protection of the laws and as much a denial of liberty or property without due process as it was to subject the applicant Jones to examination before the Securities and Exchange Commission after he had withdrawn his application.

In any case, irrespective of the view that this Court takes as to the proper construction of subsections (e) and (f) of Sec. 10 of the National Labor Relations Act, an important question is raised, as to which counsel have been unable to find any guide by decision of this Court.

Point II.

The denial by the District Court of petitioner's right of review by that court, during the vacation period of the Circuit Court of Appeals, raises an important question of the construction of the National Labor Relations Act which this Court should determine by certiorari.

The object of the review by this Court by certiorari under Sec. 240 of the Judicial Code (28 U. S. C. A., Sec. 347) is

to secure uniformity of rulings among the Circuit Courts as well as to have this Court pass on matters of importance.

Warner v. *New Orleans*, 167 U. S. 467, 42 L. Ed. 239;
Hamilton Brown Shoe Co. v. *Wolf*, 240 U. S. 251, 60 L. Ed. 629;
Houston Oil Co. v. *Goodrich*, 245 U. S. 440, 62 L. Ed. 385.

Cases where this Court has granted certiorari on the ground of the importance of the question involved include the following:

(1) A case involving the extent of mineral rights concerned in a long litigation. *Montana Mining Co.* v. *St. Louis Mining & Milling Co.*, 204 U. S. 204, 51 L. Ed. 444.

(2) A case involving the question of whether a Chinese merchant, domiciled here for many years, must on his return from a visit to China, present the certificate required by the Chinese Exclusion Act. *Ex parte Lau Ow Bew*, 141 U. S. 583, 35 L. Ed. 868.

(3) Cases as to the effect of findings of fact by the National Labor Relations Board.

National Labor Relations Board v. *Waterman S. S. Corp.*, 309 U. S. 206, 84 L. Ed. 704, 60 S. Ct. 493, rehearing denied in 309 U. S. 696, 84 L. Ed. 1036, 60 S. Ct. 611;
National Labor Relations Board v. *Link-Belt Co.*, 311 U. S. 584, 85 L. Ed. 368, 61 S. Ct. 358.

(4) Cases involving the administration of the National Labor Relations Act.

H. J. Heinz Company v. *National Labor Relations Board*, 311 U. S. 514, 85 L. Ed. 309;
National Labor Relations Board v. *Virginia Electric and Power Company*, — U. S. —, 86 L. Ed., Adv. p. 306.

On certiorari, this Court is vested with a "comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the circuit court of appeals, and of those classes of cases in which the decision of that court is declared a finality, and this Court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination". *Forsyth* v. *Hammond*, 166 U. S. 506, at p. 513, 41 L. Ed. 1095, at p. 1098.

The entire case may be brought before the Supreme Court for examination, although the Circuit Court of Appeals may have been precluded from a consideration of all the questions in the case by reason of its decree on a prior appeal. *Panama R. Co.* v. *Napier Shipping Co.*, 166 U. S. 280, 41 L. Ed. 1004.

As was stated by Mr. Justice Sutherland, rendering the unanimous decision of the Court in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U. S. 555, at p. 567, 75 L. Ed. 544, at p. 551, on certiorari, the entire record is before this Court.

Applying these principles to the present suit, the action of the District Court in dismissing, for lack of jurisdiction, the application of petitioner to review the order of the Board, is part of the entire proceedings in the case which may be brought up on writ of certiorari.

The refusal of the District Court in the present case to take jurisdiction during the vacation of the Circuit Court of Appeals, of an application to review an order of the National Labor Relations Board, while recognizing the right of the Board to apply to the District Court in vacation for an order of enforcement raises a serious question

of the interpretation of Sec. 10 (e) and (f) of the National Labor Relations Act.

Since the denial of certorari by this Court imports no expression of opinion on the merits of the case (*U. S.* v. *Carver*, 260 U. S. 482, 490, 67 L. Ed. 361, 364; *Atlantic Coast Line R. R.* v. *Powe*, 283 U. S. 401, 403, 75 L. Ed. 1142, 1143), and since the question raised as to the proper construction of Sec. 10 (e) and (f) is an important one, which should be adjudicated by this Court, certiorari should issue from this Court for that Purpose.

Point III.

The Circuit Court of Appeals erred in affirming the order of the Board insofar as it ordered re-instatement of named individuals without a finding of fact by the Board, supported by substantial evidence, that the persons ordered to be reinstated have not, prior to the date of the order, obtained other "regular and substantially equivalent employment", and without a provision in the order of the Board that the persons so named secure or attempt to secure such other equivalent employment prior to an offer of reinstatement.

Phelps Dodge Corp. v. *National Labor Relations Board*, 313 U. S. 177, 85 L. Ed. 1271.

As was stated by Mr. Justice Frankfurter, rendering the opinion of the Court, (313 U. S. 177 at p. 197, 85 L. Ed. 1271 at p. 1284):

> "The administrative process will best be vindicated by clarity in its exercise. Since Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders (Sec. 10 (e) and (f), 29 U. S. C. A. Sec. 160 (e) and (f)), it will avoid needless litigation and make for effective

and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order. We do not intend to enter the province that belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board."

Applying this decision to the present suit, the affirmance by the Circuit Court of an order of the Board ordering re-instatement of named individuals without a finding of fact by the Board, supported by substantial evidence, that the persons ordered to be re-instated have not, prior to the date of the order, obtained other "regular and substantially equivalent employment", and without a provision in the order that the persons so named secure or attempt to secure such other equivalent employment prior to an offer of re-instatement, was prejudicial error which this Court by certiorari should review.

It is respectfully submitted that this Court should take jurisdiction, by the issuance of certiorari to the United States District Court for the Middle District of Pennsylvania, and to the Circuit Court of Appeals for the Third Circuit, for the purpose of a determination by this Court of the doubtful construction of subsections (e) and (f) of Sec. 10 of the National Labor Relations Act.

Respectfully submitted,

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